(3)

Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

No. 92-1808

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

FRANK L. WHITMER and JOAN P. WHITMER,

*Petitioners,*

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

LEONARD S. SHIFFLETT
*Counsel of Record*
CARRIE A. DURKIN
WILSON & McILVAINE
500 West Madison Street
Suite 3700
Chicago, Illinois 60661
(312) 715-5000

*Attorneys for Respondent*
WILSON & MCILVAINE

BEST AVAILABLE COPY

## QUESTION FOR REVIEW

Whether there is any basis for the granting of the petition for writ of certiorari where the only issue raised is whether the denial of a Rule 60(b) motion for relief is an abuse of discretion.

## LIST OF PARTIES

Wilson & McIlvaine is a partnership, engaged in the practice of law, and as such has no parents, subsidiaries or affiliates.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTION FOR REVIEW | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 3 |
| THIS CASE DOES NOT PRESENT THE TYPE OF ISSUE WHICH MERITS THIS COURT'S REVIEW ON WRIT OF CERTIORARI | 3 |
| CONCLUSION | 6 |

## TABLE OF AUTHORITIES


| CASES: | PAGE |
|---|---|
| *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978) ..... | 4 |
| *Whitmer v. John Hancock Mutual Life Ins. Co.*, 498 U.S. 822, 111 S. Ct. 72 (1990) ..... | 2 |
| *Whitmer v. John Hancock Mutual Life Ins. Co.*, ___ U.S. ___, 112 S. Ct. 875 (1992) ..... | 2 |
| *Whitmer v. John Hancock Mutual Life Ins. Co.*, ___ U.S. ___, 112 S. Ct. 2001 (1992) ..... | 2 |

OTHER AUTHORITIES:

Federal Rule of Civil Procedure 60(b) ..... *passim*

Supreme Court Rule 10 ..... *passim*

No. 92-1808

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

---

FRANK L. WHITMER and JOAN P. WHITMER,

*Petitioners,*

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,

*Respondents.*

---

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

## STATUTORY PROVISIONS INVOLVED

**Federal Rule of Civil Procedure Rule 60.**
**Relief From Judgment or Order**

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . .

**Supreme Court Rule 10. Considerations Governing Review on Writ of Certiorari**

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

## STATEMENT OF THE CASE [1]

### Procedural Background Of The Litigation

Petitioners were plaintiffs in the district court. On June 26, 1990, petitioners did not appear in court for a scheduled status hearing. The district court dismissed the case for want of prosecution. Petitioners appealed the dismissal to the Seventh Circuit Court of Appeals ("Appellate Court") which subsequently dismissed the appeal.[2] The Supreme Court denied petitioners' Petition for Writ of Certiorari (*Whitmer v. John Hancock Mutual Life Ins. Co.*, ___ U.S. ___, 112 S. Ct. 875 (1992)) and the subsequent petition for rehearing (*Whitmer, supra*, ___ U.S. ___, 112 S. Ct. 2001 (1992)).

On or about July 27, 1990, petitioners filed a motion to vacate the district court dismissal under the Federal Rules of Civil Procedure, Rule 60(b), which motion was denied on July 1, 1991.[3] The petitioners appealed that denial and the Appellate Court affirmed the district court's ruling

---

[1] Petitioners' statement of the case omits and mischaracterizes much of the procedural history of this action and is replete with allegations that have no basis in the record. The sole issue is procedural and is set forth in its limited parameters in this Statement.

[2] Petitioners moved for numerous extensions of time but failed to file a brief timely despite approximately 8 months of extensions granted by the Appellate Court.

[3] The district court delayed its ruling because the district court had stayed the matter pending resolution of petitioners' earlier petition for writ of certiorari, seeking the review of a district court order transferring the case from the Western Division to the Eastern Division of Illinois. That petition for certiorari was also denied. *Whitmer v. John Hancock*, 498 U.S. 822 (1990).

on December 16, 1992 in an unpublished order. On February 9, 1993, the Appellate Court denied the petition for rehearing and this Petition for Writ of Certiorari ensued.

## SUMMARY OF ARGUMENT

The only issue before this Court is whether there exists a special or important reason, such as a conflict among decisions of the circuits, to grant this Petition for Writ of Certiorari. The denial of a Rule 60(b) motion is a matter of discretion and brings up for review only the ruling on the motion and not the underlying judgment. Accordingly, petitioners have not presented an issue which merits this Court's further review.

## ARGUMENT

### THIS CASE DOES NOT PRESENT THE TYPE OF ISSUE WHICH MERITS THIS COURT'S REVIEW ON WRIT OF CERTIORARI.

Rule 10 of the Supreme Court Rules sets forth the "character of reasons" for which review on writ of certiorari would be indicated. With reference to decisions of a federal court, these reasons include a conflict between circuit court decisions, a conflict between federal court and state court decisions on a federal question, or a clear departure from the usual course of judicial proceedings. No

federal question is properly raised in this appeal.[4] Accordingly, to come within the guidelines of Rule 10, petitioners must demonstrate a conflict between the circuit courts of appeal or a clear departure from accepted law by either the district court or a sanctioning of that departure by an Appellate Court.

Petitioners have not seriously asserted any conflict among the circuits. Petitioners apparently would place their case into the remaining category: that the district court so far departed from the usual course of judicial proceedings as to warrant exercise of this Court's power of supervision. This case clearly does not fall within that character of reason.

This Court has already denied certiorari on the propriety of dismissals by the district court and the Appellate Court, respectively, of the underlying case and its appeal. This Court has refused to review whether those courts properly exercised their discretion. This Court rejected petitioners' contention that the dismissals warranted review on writ of certiorari. Once passage of time from judgment caused Rule 60 to be the sole source of relief in the trial court, petitioners' application for relief was required to meet the additional standards of the Rule.[5]

---

[4] The appeal from a denial of a Rule 60(b) motion brings up for review only the ruling on the motion to vacate and not the underlying judgment. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257 (1978). Thus, even if the petitioners' claims were somehow construed to have raised a federal question below, that issue is not reviewable in this proceeding.

[5] Petitioners cited all six grounds for relief under Rule 60(b) in their motion to vacate. The Appellate Court premised its ruling on Rule 60(b)(1) because petitioners failed to pursue the others on appeal.

Therefore, relief under Rule 60(b) posed a higher standard for petitioner to meet than appellate review of the original dismissal. The initial review process to affirm the dismissals should dispose of any contention that denial of a Rule 60(b) motion was a "far depart[ure] from the accepted and usual course of judicial proceedings." Supreme Court Rule 10.

Additionally, the district court had a reasonable basis for denial of the motion. The district court was in the best position to observe the manner in which the petitioners conducted the litigation. Petitioners made endless motions for continuances of each due date of briefs. They appeared unwilling to address the substantive issues raised in motions directed to their complaint, instead content to blame the courts and the defendants for their failure to comply with any briefing schedule in the district court. Only after suffering dismissal of an earlier appeal did the petitioners take the Appellate Court's admonitions seriously enough to file a brief, and then, only after motions seeking extentions for the filing. The arguments that petitioners raise in the petition are the same contentions petitioners have used through five years of dilatory motions. The district court had a solid basis to deny the motion and the Appellate Court had sufficient grounds to affirm that denial.

The relevant issue in this case does not raise an important question of federal law or an issue with conflicting decisions in the circuit courts. Any resolution of petitioners' allegations would certainly not contribute to the development of national law. There has been no departure, much less a far departure, from accepted judicial proceedings. Rather, the Court is presented with dissatisfied litigants who have exhausted their avenues for relief through a refusal to comply with court rules and pro-

cedures. The valuable resources of the Supreme Court should not be squandered on further consideration of petitioners' stale arguments.

## CONCLUSION

Respondent Wilson & McIlvaine requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

LEONARD S. SHIFFLETT
*Counsel of Record*
CARRIE A. DURKIN
WILSON & McILVAINE
500 West Madison Street
Suite 3700
Chicago, Illinois 60661
(312) 715-5000

*Attorneys for Respondent*
WILSON & MCILVAINE